

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

RICHARD BURREL,

Petitioner,

Case No. 1:10-cv-901

v.

HON. JANET T. NEFF

JOHN PRELESNIK,

Respondent.

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**OPINION AND ORDER**

Petitioner filed this habeas corpus petition pursuant to 28 U.S.C. § 2254, alleging ineffective assistance of counsel (Claims I & III) and a due process violation arising from the scoring of his sentencing guidelines (Claim II). The matter was referred to the Magistrate Judge, who issued a Report and Recommendation (R&R, Dkt 24), recommending that this Court grant the petition as to Claim I and deny the remainder of the petition. Respondent filed a response to the Report and Recommendation, indicating it has “no objection to the Magistrate Judge’s Report and Recommendation which recommends granting Petitioner Burrel habeas relief on Claim I (ineffective assistance of appellate counsel) only and ordering that, within 90 days, the state appoint counsel for the purpose of pursuing first-tier appellate review” (Dkt 25). The matter is presently before the Court on Petitioner’s objection to the denial of habeas relief on his Claim II (Dkt 26).

In accordance with 28 U.S.C. § 636(b)(1) and FED. R. CIV. P. 72(b)(3), the Court has performed de novo consideration of those portions of the Report and Recommendation to which objection has been made. The Court denies the objection and issues this Opinion and Order. The

Court will also issue a Judgment in this § 2254 proceeding. *See Gillis v. United States*, No. 12-3397, 2013 WL 4779112, at \*2 (6th Cir. Sept. 9, 2013) (requiring a separate judgment in habeas proceedings).

With regard to Petitioner's Claim II, the Magistrate Judge concluded that "Petitioner cannot establish that the calculation of his sentencing guidelines score was incorrect or based on inaccurate information" (R&R, Dkt 24 at 14). Specifically, the Magistrate Judge determined that the trial court properly scored Prior Record Variable 2 in light of Petitioner's 2004 felony assault conviction (*id.* at 11, citing MICH. COMP. LAWS § 777.52). The Magistrate Judge also rejected Petitioner's interpretation of the "multiple offender" provisions in Offense Variables 1-3 and determined that the trial court instead properly assigned Petitioner points under Offense Variables 1-3 (*id.* at 13-14, citing MICH. COMP. LAWS §§ 777.31-777.33).

Petitioner does not address the Magistrate Judge's analysis in his objection. Petitioner merely reiterates his assertion that the trial court "erroneously scored Prior Record variable 2 and Offense Variable[s] 1-3" and that "the court may correct an invalid sentence after sentencing where, as in this case, it is based on inaccurate information" (Pet'r Obj., Dkt 26 at 2). Petitioner's general objection fails to demonstrate any factual or legal error in the Magistrate Judge's analysis of Claim II. *See* W.D. Mich. LCivR 72.3(b) (written objections "shall specifically identify the portions of the proposed findings, recommendations or report to which objections are made and the basis for such objections"). Therefore, Petitioner's objection is denied.

Having determined that Petitioner's objection lacks merit, the Court must further determine pursuant to 28 U.S.C. § 2253(c) whether to grant a certificate of appealability as to the issues raised. *See* RULES GOVERNING § 2254 CASES, Rule 11 (requiring the district court to "issue or deny a

certificate of appealability when it enters a final order”). The Court must review the issues individually. *Slack v. McDaniel*, 529 U.S. 473 (2000); *Murphy v. Ohio*, 263 F.3d 466, 466-67 (6th Cir. 2001). “Where a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court’s assessment of the constitutional claims debatable or wrong.” *Slack*, 529 U.S. at 484. Upon review, this Court finds that reasonable jurists would not find the Court’s assessment of Petitioner’s due process claims debatable or wrong. A certificate of appealability will therefore be denied.

Accordingly:

**IT IS HEREBY ORDERED** that the Objection (Dkt 26) is DENIED and the Report and Recommendation of the Magistrate Judge (Dkt 24) is APPROVED and ADOPTED as the Opinion of the Court.

**IT IS FURTHER ORDERED** that the petition for habeas corpus relief (Dkt 1) is GRANTED IN PART and DENIED IN PART as detailed in the Report and Recommendation.

**IT IS FURTHER ORDERED** that Petitioner be provided appellate counsel within 90 days of this Opinion and Order or be released from custody.

**IT IS FURTHER ORDERED** that a certificate of appealability pursuant to 28 U.S.C. § 2253(c) is DENIED as to each issue asserted.

Dated: September 25, 2013

/s/ Janet T. Neff  
JANET T. NEFF  
United States District Judge